LIM SWEE CHAI v. ADVANCECON HOLDINGS BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[ORIGINATING SUMMONS NO: WA-24NCC-123-03-2023]
19 MARCH 2024

Abstract – *The right of members to requisition a meeting, pursuant to s. 311(1) of the Companies Act 2016, does not require any minimum shareholding threshold. Such right is to be contrasted with the obligation of directors, to convene a meeting upon receiving a requisition from members holding at least 10% of the paid-up capital, as stipulated by s. 311(3) of the same Act.*

COMPANY LAW: *Director – Removal – Notice of requisition issued to convene extraordinary general meeting ('EGM') to move ordinary resolution to remove director – EGM held and director removed – Challenge against notice of requisition, EGM and resultant resolution – Whether valid and lawful – Whether director required to hold minimum 10% shareholding to requisition EGM – Whether removed director estopped from challenging validity of notice of requisition and EGM due to prolonged acquiescence – Companies Act 2016, s. 311(1)*

COMPANY LAW: *Meetings – Extraordinary general meeting – Notice of requisition – Notice of requisition issued to convene extraordinary general meeting ('EGM') to move ordinary resolution to remove director – EGM held and director removed – Challenge against notice of requisition – Allegation that notice of requisition contained misrepresentation – Whether rendered notice of requisition defective – Whether EGM convened pursuant to notice of requisition and ensuing resolution void – Whether had caused substantial injustice that could not be cured by any other order*

The plaintiff and the second defendant were co-founders of the first defendant; the former being a shareholder and non-executive director while the latter being the executive director, shareholder and group chief executive officer. The second and first defendants were the most and second most substantial shareholders of the first defendant, respectively. The second defendant had issued a notice of requisition, pursuant to s. 311 of the Companies Act 2016 ('Act') and cl. 72 of the first defendant's constitution ('company's constitution'), to the first defendant to requisition the Board of Directors ('Board') of the first defendant to convene an extraordinary general meeting ('EGM') to move an ordinary resolution to remove the plaintiff as a director, with immediate effect. The Board passed directors' circular resolutions resolving: (i) to hold an EGM with the venue, date and time to be determined later ('first directors' resolution'); and later, (ii) that the EGM would be held virtually on 9 August 2022 at 10am to consider the ordinary resolution to remove the plaintiff as a director. During the EGM, 77.83%

of the members voted in favour of the ordinary resolution to remove the plaintiff. The plaintiff commenced the present originating summons, seeking damages and declaratory orders to declare the entire process, from the requisition to the EGM and the resultant resolution, null and void. The plaintiff challenged the validity and lawfulness of the notice of requisition, the EGM and the resolution removing him as a director on the basis that the second defendant did not hold the minimum 10% shareholding allegedly required to requisition an EGM under s. 311 of the Act and cl. 72 of the company's constitution.

Held (dismissing originating summons):

(1) A plain reading of s. 311 of the Act shows that it deals with two distinct situations. Subsection (1) provides that 'the members of a company may require the directors to convene a meeting of members of the company'. On its own, this subsection does not precondition any shareholding threshold on a member's right to requisition a meeting. This contrasts with sub-s. (3) which stipulates that directors shall convene a members' meeting upon receiving a 'requisition from members representing at least ten per centum of the paid-up capital of the company'. The bifurcation between these subsections is pivotal; sub-s. (1) governs members' right to requisition a meeting while sub-s. (3) sets out when directors were obliged to act on such a requisition. The plaintiff's attempt to read a 10% threshold into s. 311(1) of the Act and cl. 72 of the company's constitution was untenable; it went against established canons of statutory interpretation by seeking to add words that were simply not there. (paras 39 & 43)

(2) The second defendant, as a registered member of the first defendant, was entitled to issue the notice of requisition under s. 311(1) of the Act notwithstanding his direct shareholding was 0.22%. The Board, fully apprised of the second defendant's position, chose to convene the EGM pursuant to its own powers under the company's constitution. (para 45)

(3) Despite receiving the notice of requisition on 28 June 2022 and attending the EGM on 9 August 2022, where he exercised his right to make representations, the plaintiff did not raise any objections until 9 December 2022. This prolonged acquiescence was inconsistent with the plaintiff's stance, that the notice of requisition and the EGM were invalid and lend credence to the defendant's submission that the plaintiff was estopped from now challenging the validity of the notice of requisition and the EGM. The plaintiff, having participated in the EGM without demur and failing to show any irremediable prejudice, could not now be heard to impeach the process. (paras 46 & 47)

(4) The plaintiff submitted that while the notice of requisition stated that the second defendant held at least 10% of the first defendant's issued paid-up capital, the company's Register of Depository revealed that he

actually held only 0.22%. According to the plaintiff, this misrepresentation rendered the notice of requisition defective and consequently, the EGM convened pursuant to it and the ensuing resolution to remove the plaintiff as director should be declared void. No proceeding is invalid due to any defect or irregularity unless the court is satisfied that it has caused substantial injustice that could not be cured by any other order. The plaintiff, however, had not discharged the burden of proving substantial injustice. The irregularity complained of was a misstatement. While the notice of requisition contained an inaccurate statement of the second defendant's shareholding, this irregularity did not ultimately prejudice the plaintiff in any substantial way incapable of remedy. (paras 48, 53, 54 & 62)

Case(s) referred to:

Burland v. Earle [1902] AC 83 ***(refd)***

Chong Mei Ling & Ors v. Apft Bhd & Ors [2018] CLJU 2051; [2018] 1 LNS 2051 HC ***(refd)***

EKA Noodle Bhd v. Norhayati Tukiman [2021] CLJU 1435; [2021] 1 LNS 1435 HC ***(refd)***

Lim Seng Boon & Anor v. Chew Shin Yong, Mark & Ors [2022] CLJU 1490; [2022] 1 LNS 1490 HC ***(refd)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***

Tan Kah Fatt & Anor v. Tan Ying [2023] 2 CLJ 169 FC ***(refd)***

Teo Kim Hui & Ors v. Golden Plus Holdings Bhd & Another CAse [2021] 7 CLJ 965 HC ***(refd)***

Thio Keng Poon v. Thio Syn Pyn & Ors And Another Appeal [2010] SGCA 16 ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), s. 144(1)

Companies Act 2016, ss. 206(2), 207(2), 310(a), 311(1), (3)(a), 314, 321(1), 582(1), (2)

For the plaintiff - Beh Chee Wei; M/s Beh & Co

For the 1st defendant - Eric Tan & Jamie Chan; M/s Ong Kok Bin & Co

For the 2nd defendant - Lee Shih & Wong Chee Chien; M/s Lim Chee Wee Partnership

Reported by Najib Tamby

JUDGMENT

Atan Mustaffa Yussof Ahmad J:

Introduction

[1] In the tapestry of corporate law, the threads of director-shareholder relationships, statutory interpretation, and the sanctity of democratic decision-making often intertwine in complex and unexpected ways. The present originating summons, filed by the plaintiff, Lim Swee Chai, against the first defendant, Advancecon Holdings Berhad ("Advancecon"), and the second defendant, Phum Ang Kia, presents this court with one such intricate

knot to unravel. At its heart, lies a challenge to an extraordinary general meeting ("EGM") of Advancecon convened on 9 August 2022 and a resolution passed thereat to remove the plaintiff as director, which the plaintiff contends are invalid, null and void. The plaintiff's attack is premised on the alleged invalidity of the notice of requisition dated 25 June 2022 ("the notice of requisition") issued by the second defendant to requisition the EGM, owing to the second defendant's purported lack of the requisite shareholding. The defendants, in turn, stoutly defend the validity of the notice of requisition, the EGM, and the impugned resolution, arguing that the second defendant, as a member of Advancecon, was entitled to request a meeting, and that the Board of Directors acted within its powers to convene the EGM, at which the majority shareholders validly exercised their right to remove the plaintiff as director.

Background Facts

[2] The plaintiff and the second defendant are the co-founders of the first defendant, Advancecon. Advancecon was incorporated in Malaysia on 9 April 1997 and was listed on the Main Market of Bursa Malaysia in July 2017.

[3] At the material time, the plaintiff was a shareholder and non-executive director of Advancecon, while the second defendant was an executive director, shareholder and the group chief executive officer. Advancecon has more than 3,300 shareholders.

[4] The second defendant is the most substantial shareholder of Advancecon, holding 97,563,750 shares representing approximately 20.18% of the total issued shares of Advancecon, held either under his own name or through various nominee companies. The plaintiff is the second most substantial shareholder, holding 54,038,250 share, representing approximately 11.18% of the total issued shares of Advancecon.

[5] On 25 June 2022, the second defendant issued the notice of requisition to Advancecon to requisition the Board of Directors of Advancecon ("the Board") to convene an EGM for the purpose of moving an ordinary resolution to remove the plaintiff as a director of Advancecon with immediate effect. The notice of requisition was made pursuant to s. 311 of the Companies Act 2016 ("CA 2016") and cl. 72 of the Advancecon's constitution.

[6] On 29 June 2022, the Board passed a directors' circular resolution ("first directors' resolution") resolving pursuant to Advancecon's Constitution to hold an EGM, with the venue, date and time to be determined later.

[7] On 8 July 2022, the Board passed a further Directors' Circular Resolution ("second directors' resolution") resolving pursuant to Advancecon's Constitution that the EGM will be held virtually on 9 August 2022 at 10am for the purpose of considering the ordinary resolution to remove the plaintiff as director.

[8] On 12 July 2022, the company secretary of Advancecon issued a notice of EGM to the shareholders pursuant to the second directors' resolution.

[9] The EGM was duly held virtually on 9 August 2022 and was chaired by Yeoh Chong Keat, the independent non-executive chairman. It was attended by 96 members, including the plaintiff. At the EGM, the plaintiff was invited to provide oral representations on the proposed resolution for his removal. The second defendant also addressed the EGM. After a question-and-answer session, the members voted and the poll results showed that 77.83% voted in favour of the ordinary resolution to remove the plaintiff as a director with immediate effect.

[10] Following the EGM, Advancecon made the necessary announcements on the EGM outcome and the change in composition of the Board to Bursa Malaysia. The company secretary also lodged the relevant notification with the Registrar of Companies Commission of Malaysia to reflect the plaintiff's removal as director.

[11] On 9 December 2022, about four months after the EGM, the plaintiff issued a letter to Advancecon *via* his solicitors complaining that the EGM and its outcome were invalid. Advancecon replied on 19 December 2022 denying any irregularity and stating that any irregularity can be cured by the court. Further correspondence was exchanged between the parties in January 2023.

[12] On 3 March 2023, the plaintiff filed an originating summons in the High Court against Advancecon and the second defendant, seeking declaratory orders that the notice of requisition, notice of EGM, the EGM itself and all actions arising from it are unlawful, null and void.

Plaintiff's Application

[13] In the originating summons, the plaintiff, Lim Swee Chai, seeks the following key declaratory reliefs:

(i) a declaratory order to declare that the second defendant does not hold at least 10% of the paid-up capital of the carrying the rights to vote at the general meeting pursuant to s. 311 CA 2016 as required by cl. 72 of Advancecon's constitution and has no rights or *locus standi* to issue the notice of requisition dated 25 June 2022;

(ii) a declaratory order to declare that the notice of requisition issued by the second defendant does not fulfil the requirements in cl. 72 of Advancecon's constitution and s. 311 of the CA 2016;

(iii) a declaratory order to declare that the notice of requisition, the notice of EGM, the EGM held on 9 August 2022 and all actions and proceedings subsequently derived from the notice of requisition are unlawful and null and void; and

(iv) general damages to be assessed by the court and paid by the defendants jointly and/or severally to the plaintiff forthwith.

[14] In essence, the plaintiff is challenging the validity and lawfulness of the notice of requisition, the EGM, and the resolution removing him as director, on the basis that the second defendant did not hold the minimum 10% shareholding allegedly required to requisition an EGM under the CA 2016 and Advancecon's constitution. The plaintiff is asking the court to declare the entire process, from the requisition to the EGM and the resultant resolution, as null and void.

Plaintiff's Submissions

[15] The plaintiff argues that the EGM of Advancecon held on 9 August 2022, and the resolution passed to remove him as director are invalid. This is because the EGM was based on a defective notice of requisition dated 25 June 2022 issued by the second defendant.

[16] The plaintiff's main contention is that the notice of requisition was invalid because the second defendant held only 0.22% of Advancecon's paid-up share capital, well below the statutory minimum of 10% required by s. 311 of the CA 2016 and cl. 72 of Advancecon's constitution for requisitioning a members' meeting. This misrepresentation, claiming at least 10% ownership when only 0.22% was held, renders the notice of requisition defective.

[17] As a result, the plaintiff asserts that the EGM and all decisions made therein, including his removal as director, are legally unsustainable and should be declared void *ab initio* by the court. The plaintiff seeks a declaration that the EGM and the impugned resolution are invalid, null, and void.

First Defendant's Submissions

[18] Advancecon asserts the validity of the EGM held on 9 August 2022 and the resolution to remove the plaintiff as director. Advancecon maintains that the EGM was convened by the Board in accordance with Advancecon's constitution, not solely based on the notice of requisition from the second defendant.

[19] Advancecon explains that upon receiving the notice of requisition, the Board decided to convene the EGM "pursuant to [the] company's Constitution," as shown in the directors' circular resolutions dated 29 June 2022 and 8 July 2022. This decision, made under s. 310(a) of the CA 2016 and cl. 72 of the constitution, is within the Board's discretionary powers and is separate from members' requisition rules under s. 311 of the CA 2016.

[20] Furthermore, Advancecon argues that any irregularity in the notice of requisition would not invalidate the separately and validly convened EGM by the Board. It emphasises that the Board's decision was made in good faith and for proper purposes, aligning with the principle of non-interference in internal company management.

[21] Advancecon also points out that the plaintiff was given notice of the EGM, attended, spoke, and had the opportunity to present his case. The resolution for his removal was passed by a significant majority of 77.83% of voting members, as per s. 206 of the CA 2016.

[22] Therefore, Advancecon requests the dismissal of the plaintiff's originating summons with costs, citing that the EGM and resolution reflect the majority shareholders' will in compliance with CA 2016 and the constitution.

Second Defendant's Submissions

[23] The second defendant argues that the EGM and the resolution to remove the plaintiff as director were valid. He asserts that his notice of requisition despite inaccuracies in shareholding details, was a valid requisition under s. 311(1) of the CA 2016 and does not require a minimum shareholding threshold.

[24] The second defendant emphasises that his status as a registered member of Advancecon grants him the right to requisition a meeting, as evidenced by the Register of Depositors. He argues that any irregularities in the notice of requisition do not invalidate his request under s. 311(1) of the CA 2016.

[25] Additionally, the second defendant points out that the Board's decision to convene the EGM, as reflected in directors' circular resolutions, was within its constitutional powers and cured any irregularity in the notice of requisition.

[26] Furthermore, the second defendant contends that the plaintiff has not shown substantial prejudice from these actions and did not object until much later, making the challenge an abuse of process.

[27] Therefore, the second defendant requests the dismissal of the originating summons with costs, as the plaintiff's complaint lacks merit and attempts to override majority shareholder decisions.

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Statutory Provisions

[28] CA 2016 provides a comprehensive legal framework governing the management and administration of companies in Malaysia. Several key provisions of the CA 2016 are particularly relevant in the context of members' meetings, director removal, and the effect of irregularities in company proceedings.

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[29] Section 311 of the CA 2016 deals with the power of members to require directors to convene a meeting of members. Subsection (1) states that "the members of a company may require the directors to convene a meeting of members of the company." This establishes the fundamental right of members to requisition a meeting. Subsection (3) further provides that "the directors shall call for a meeting of members once the company has received requisition to do so from members representing at least ten per centum of the paid-up capital of the company carrying the right of voting at meetings of members of the company, excluding any paid-up capital held as treasury shares." This subsection sets a minimum threshold of 10% shareholding for members to compel directors to convene a meeting upon requisition. Section 311 reads:

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(1) The members of a company may require the directors to convene a meeting of members of the company.

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(2) A requisition under subsection (1):

(a) shall be in hard copy or electronic form;

(b) shall state the general nature of the business to be dealt with at the meeting;

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(c) may include the text of a resolution that may properly be moved and is intended to be moved at the meeting; and

(d) shall be signed or authenticated by the person making the requisition.

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(3) The directors shall call for a meeting of members once the company has received requisition to do so from:

(a) members representing at least ten per centum of the paid up capital of the company carrying the right of voting at meetings of members of the company, excluding any paid up capital held as treasury shares; or

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(b) in the case of a company not having a share capital, members who represent at least five per centum of the total voting rights of all members having a right of voting at meetings of members.

(4) Notwithstanding subsection (3), in the case of a private company, members representing at least five per centum of the paid up capital of the company carrying the right of voting at meeting of members of the company may require a meeting of members to be convened

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if more than twelve months has elapsed since the end of the last meeting of members convened pursuant to a requisition under this section and the proposed resolution is not defamatory, vexatious or frivolous.

(5) A resolution may properly be moved at a meeting unless the resolution:

(a) if passed, would be ineffective whether by reason of inconsistency with any written law or the constitution;

(b) is defamatory of any person;

(c) is frivolous or vexatious; or

(d) if passed, would not be in the best interest of the company.

(6) For the purposes of subsections (3) and (4), the right of voting shall be determined at the date the requisition is deposited with the company.

[30] Section 310 of the CA 2016 provides an alternative avenue for convening members' meetings. It states that a meeting of members may be convened by "(a) the Board; or (b) any member holding at least ten per centum of the issued share capital of a company or a lower percentage as specified in the constitution or if the company has no share capital, by at least five per centum in the number of the members." This provision empowers the Board of Directors to independently convene a general meeting, distinct from the members' requisition power under Section 311. Section 310 reads:

A meeting of members may be convened by:

(a) the Board; or

(b) any member holding at least ten per centum of the issued share capital of a company or a lower percentage as specified in the constitution or if the company has no share capital, by at least five per centum in the number of the members.

[31] Sections 206 and 207 of the CA 2016 deal with the removal of directors and their right to be heard. Section 206(2) provides that "notwithstanding anything in the constitution or any agreement between a public company and a director, the company may by ordinary resolution at a meeting remove the director before the expiration of the director's tenure of office." This enshrines the right of members to remove a director by ordinary resolution at a general meeting. Section 207(2) stipulates that "the director shall be given the right to make oral representation or written representation not exceeding a reasonable length on the resolution to remove him." This guarantees the right of a director facing a removal resolution to be heard at the general meeting.

[32] Section 206 of the CA 2016 provides:

(1) A director may be removed before the expiration of the director's period of office as follows:

(a) subject to the constitution, in the case of a private company, by ordinary resolution; or

(b) in the case of a public company, in accordance with this section.

(2) Notwithstanding anything in the constitution or any agreement between a public company and a director, the company may by ordinary resolution at a meeting remove the director before the expiration of the director's tenure of office.

(3) Special notice is required of a resolution to remove a director under this section or to appoint another person instead of the director at the same meeting.

(4) Notwithstanding paragraph (1)(b), if a director of a public company was appointed to represent the interests of any particular class of shareholders or debenture holders, the resolution to remove the director shall not take effect until the director's successor has been appointed.

(5) A person appointed as director in place of a person removed under this section shall be treated, for the purpose of determining the time at which he or any other director is to retire, as if he had become a director on the day on which the person in whose place he is appointed was last appointed a director.

[33] Section 207 of the CA 2016 provides:

(1) On receipt of special notice for a resolution to remove a director under subsection 206(3), the company shall forthwith send to the director a copy of the special notice.

(2) The director shall be given the right to make oral representation or written representation not exceeding a reasonable length on the resolution to remove him.

(3) Where the director makes written representation and requests the written representation be notified to the members, the company shall, unless the representation is received too late for the company to do so:

(a) state the fact of the representation having been made in the notice of the resolution given to members of the company; and

(b) send a copy of the representation to every member of the company to whom the notice of the meeting is sent.

(4) If a copy of the representations is not sent as required under subsection (3) due to the representations received too late by the company or due to the default of the company, the director may, without prejudice to his right to be heard orally, require that the representations shall be read out at the meeting.

(5) Copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this section are being abused.

(6) The Court may order the company's costs on an application under subsection (5) to be paid in whole or in part by the director, notwithstanding that he is not a party to the application.

(7) The constitution of a private company may provide the rights accorded under this section to its directors.

[34] Section 582 of the CA 2016 addresses the effect of irregularities in company proceedings. It states that "no proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the court is of the opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the court." This provision sets a high threshold for judicial intervention in company affairs, requiring the complainant to demonstrate substantial irremediable injustice arising from the alleged irregularity.

[35] Section 582(1) and (2) of the CA 2016 provide:

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of the opinion that substantial injustice has been or may be caused which cannot be remedied by any order of the Court.

(2) The Court may, if it thinks fit, make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

Analysis And Findings Of The Court

Whether The Notice Of Requisition Is Null And Void

[36] The plaintiff contends that the notice of requisition issued by the second defendant to Advancecon for convening an EGM to remove the plaintiff as director, is null and void. The plaintiff submits that the second defendant, holding only 0.22% of Advancecon's paid-up capital, falls short of the purported 10% minimum shareholding threshold stipulated in s. 311 of the CA 2016 and cl. 72 of Advancecon's constitution for requisitioning a members' meeting. Consequently, the plaintiff argues that the EGM held on 9 August 2022 pursuant to the impugned notice of requisition, and all ensuing actions, are invalid. Clause 72 of Advancecon's constitution is set out below for reference:

The Directors may call general meetings or, on the requisition of members who hold at the date of the deposit of the requisition not less than one-tenth (1/10) of such paid-up capital of the Company carrying the right to vote at general meetings pursuant to Section 311 of the Act, forthwith proceed to call for an extraordinary general meeting within fourteen (14)

A days from the date of the requisition, the meeting of which is to be held on a date not more than twenty-eight (28) days after the date of the notice to convene the meeting.

[37] The defendants counter that the plaintiff has misconstrued s. 311 of the CA 2016 and cl. 72 of the constitution. They contend that s. 311(1) of the B CA 2016 permits any member, regardless of shareholding, to request the directors to convene a members' meeting, and that the 10% threshold in s. 311(3) only mandates when directors must comply with such a request. The second defendant maintains that as a registered member of Advancecon, he was entitled to issue the notice of requisition, and that the Board validly C convened the EGM in the proper exercise of its powers under the constitution. The defendants further submit that the plaintiff, despite having opportunities to do so, did not object to the notice of requisition until more than four months after the EGM, and is therefore estopped from now challenging its validity.

D **[38]** Having considered the parties' submissions and the evidence, I find in favour of the defendants. In my judgment, the plaintiff's argument for a universal 10% paid-up capital threshold for requisitioning members' meetings under s. 311(1) of the CA 2016 and cl. 72 of the constitution is unsustainable and must be rejected.

E **[39]** Firstly, a plain reading of s. 311 of the CA 2016 shows that it deals with two distinct situations. Subsection (1) provides that "the members of a company may require the directors to convene a meeting of members of the company." On its own, this subsection does not precondition any shareholding threshold on a member's right to requisition a meeting. This F contrasts with sub-s. (3), which stipulates that directors shall convene a members' meeting upon receiving a requisition from "members representing at least ten per centum of the paid-up capital of the company". The bifurcation between these subsections is pivotal. Subsection (1) governs members' right to requisition a meeting, while sub-s. (3) sets out when G directors are obliged to act on such a requisition.

[40] To fully comprehend this distinction, it is instructive to refer to s. 311's predecessor, s. 144 of the Companies Act 1965 ("CA 1965"). Section 144(1) of the CA 1965 mandated directors to convene a members' meeting "on the requisition of members holding at the date of the deposit of H the requisition not less than one-tenth of such of the paid-up capital". Parliament, in enacting s. 311 of the CA 2016, deliberately departed from this position, decoupling the right to requisition from the duty to convene. This change evinces a clear legislative intent to liberalise the regime governing members' requisitions and supports the defendants' interpretation I of s. 311.

[41] In this context, the Federal Court's decision in *Tan Kah Fatt & Anor v. Tan Ying* [2023] 2 CLJ 169; [2023] 2 MLRA 525 assumes relevance. The Federal Court emphasised that in interpreting statutes, courts should favour a construction that promotes the legislation's purpose, object and intent. The Federal Court held:

> With the introduction of s. 17A of the Interpretation Acts 1948 and 1967, the purposive rule of construction prevailed over the literal rule of construction when one was construing statutes. The literal rule of construction ought to give way to the purposive rule and in discerning the meaning borne in the terms used in any particular legislation, the Courts ought to favour a construction which promoted the purpose, object or intent of the legislation over a construction which did not. Such an approach did not wait for the state of ambiguity to present before the purposive approach was adopted and applied.

[42] Applying this principle here, the manifest object of s. 311 of the CA 2016, evident from its divergence from s. 144 of the CA 1965, is to democratise the requisition process by enabling any member to request a meeting, while still preserving the 10% threshold for when directors must accede to such a request.

[43] Against this backdrop, the plaintiff's attempt to read a 10% threshold into s. 311(1) and cl. 72 of the constitution is untenable. It goes against established canons of statutory interpretation by seeking to add words that are simply not there. If Parliament had intended for such a restriction to apply to all requisitions, it would not have bifurcated s. 311 into two distinct parts. The plaintiff's interpretation would render this bifurcation redundant.

[44] The authorities cited by the plaintiff do not advance his case. *EKA Noodle Bhd v. Norhayati Tukiman* [2021] CLJU 1435; [2021] 1 LNS 1435; [2021] 12 MLJ 137 concerned whether the word "members" in s. 311(3)(a) of the CA 2016 encompassed a single member, while *Chong Mei Ling & Ors v. Apft Bhd & Ors* [2018] CLJU 2051; [2018] 1 LNS 2051; [2018] MLJU 1941 dealt with the court's powers under s. 314 of the CA 2016 to order a meeting upon a director's refusal. Neither case directly addresses the central question of whether s. 311(1) itself imposes a minimum shareholding requirement.

[45] On the facts, it is evident that the second defendant, as a registered member of Advancecon, was entitled to issue the notice of requisition under s. 311(1) of the CA 2016, notwithstanding that his direct shareholding was 0.22%. The Board, fully apprised of the second defendant's position, chose to convene the EGM pursuant to its own powers under the constitution. This is clear from the first and second directors' resolutions dated 29 June 2022 and 8 July 2022 respectively, both of which were expressly made "pursuant to company's constitution". The plaintiff's contention that the Board acted without power is thus unfounded.

[46] Moreover, the plaintiff's conduct belies his assertion that the notice of requisition and EGM were invalid. Despite receiving the notice of requisition on 28 June 2022 and attending the EGM on 9 August 2022, where he exercised his right to make representations, the plaintiff did not raise any objections until 9 December 2022, more than five months later. This prolonged acquiescence is inconsistent with the plaintiff's present stance and lends credence to the defendants' submission that the plaintiff is estopped from now challenging the validity of the notice of requisition and EGM.

[47] In the final analysis, the plaintiff's case hinges on an artificially restrictive reading of s. 311 of the CA 2016 and cl. 72 of the constitution that cannot withstand scrutiny. The notice of requisition was properly issued by the second defendant in his capacity as a member of Advancecon, and the ensuing EGM was validly convened by the Board in accordance with the constitution. The plaintiff, having participated in the EGM without demur and failing to show any irremediable prejudice, cannot now be heard to impeach the process.

Whether The Notice Of Requisition Is Defective And Invalidated

[48] The plaintiff contends that the notice of requisition issued by the second defendant to Advancecon should be invalidated due to an inaccurate representation of the second defendant's shareholding. The plaintiff submits that while the notice of requisition stated that the second defendant held at least 10% of Advancecon's issued paid-up capital, the company's Register of Depository revealed that he actually held only 0.22%. The plaintiff argues that this misrepresentation renders the notice of requisition defective and, consequently, the EGM convened pursuant to it and the ensuing resolution to remove the plaintiff as director should be declared void.

[49] The defendants acknowledge the inaccuracy in the notice of requisition but maintain that it does not warrant invalidating the notice or the subsequent EGM. Advancecon, in its affidavit, admits that it overlooked the fact that much of the second defendant's shares were pledged, leading to the misstatement in the notice of requisition. However, Advancecon clarifies that this oversight was unintentional and did not aim to deliberately mislead any shareholders or the public. The second defendant submits that notwithstanding the error, he remains undisputedly a member of Advancecon entitled to requisition a meeting, and that the Board had the discretion to convene the EGM, which it validly exercised. The defendants further contend that the plaintiff has not shown any substantial injustice arising from the irregularity that would warrant invalidating the notice of requisition or the EGM under s. 582 of the CA 2016.

[50] Having considered the parties' submissions and the evidence, I find in favour of the defendants. The central issue is whether the inaccuracy in the notice of requisition concerning the second defendant's shareholding amounts to a defect that invalidates the notice and the consequent EGM under CA 2016. In my judgment, it does not.

[51] The starting point of the analysis is s. 582 of the CA 2016, which provides that no proceeding under the Act shall be invalidated by any defect, irregularity or deficiency unless the court is of the opinion that substantial injustice has been caused and cannot be remedied by any order of the court. This provision establishes a presumption of validity and places the onus on the party alleging invalidity to demonstrate substantial irremediable injustice.

[52] The decision in *Teo Kim Hui & Ors v. Golden Plus Holdings Bhd & Another Case* [2021] 7 CLJ 965; [2021] 12 MLJ 227 elucidates the application of s. 582. The case deals with the validity of an adjourned extraordinary general meeting of Golden Plus Holdings Bhd and the adjournments made during that meeting. Section 582 of the CA 2016 was sought to be applied by the conveners to cure the defect or irregularity of failing to issue a notice to the auditor for the adjourned EGM, as required under s. 321(1) of the Act. Specifically, the court found that while there was a failure to issue the statutory notice to the auditor, this irregularity could be cured by applying s. 582, which allows the court to declare a proceeding valid notwithstanding any defect, irregularity or deficiency, unless it causes substantial injustice that cannot be remedied. In the words of Ahmad Fairuz J:

> [106] The curative provision for any defect, irregularity, or deficiency of notice is found in s. 582 of the Act. It reads as follows:
>
> (1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of the opinion that substantial injustice has been or may be caused which cannot be remedied by any order of the Court.
>
> (2) The Court may, if it thinks fit, make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.
>
> [107] A read of the provision would suggest that there is a presumption of validity in that the default position in law is that no proceeding is invalid because of any defect, irregularity, or deficiency unless the court is satisfied that substantial injustice has been caused.
>
> [108] The onus lies with the party complaining that the irregularity has caused substantial injustice and it cannot be cured by any other order of the court. It must be shown that there is a nexus between the procedural irregularity that has occurred and the matters of prejudice relied upon as constituting injustice.

[53] The High Court emphasised that the default position is that no proceeding is invalid due to any defect or irregularity unless the court is satisfied that it has caused substantial injustice that cannot be cured by any other order. Importantly, the court clarified that the complaining party bears the burden of establishing a nexus between the procedural irregularity and the substantial injustice alleged.

[54] Applying these principles to the present case, it is apparent that the plaintiff has not discharged the burden of proving substantial injustice. The irregularity complained of is the misstatement of the second defendant's shareholding in the notice of requisition. Advancecon, in Tung Kai Hung's affidavit affirmed on 10 April 2023, candidly admitted that the Board had overlooked that much of the second defendant's shares were pledged, but maintained that this error was genuine and unintended to mislead. Crucially, Advancecon affirmed that the second defendant, despite the inaccuracy, remains undisputedly a member of Advancecon and thus, entitled to requisition a members' meeting.

[55] This last point is significant. The second defendant's right to requisition a meeting stems from his status as a registered member of Advancecon, not his precise shareholding percentage. Section 311(1) of the CA 2016 enables "the members of a company" to require the directors to convene a members' meeting. It does not stipulate any minimum shareholding threshold for this right. The inaccuracy in the notice of requisition, while regrettable, does not negate the second defendant's underlying entitlement as a member to invoke s. 311(1).

[56] Moreover, as Advancecon highlighted, the decision to convene the EGM ultimately rested with the Board, which had the discretion to do so under the Constitution regardless of the second defendant's exact shareholding. The first and second directors' circular resolutions dated 29 June 2022 and 8 July 2022, respectively, evince that the Board, fully apprised of the circumstances, resolved "pursuant to [the] company's Constitution" to proceed with the EGM. The notice of requisition, even with its inaccuracy, did not fetter the Board's independent judgment.

[57] Turning to the question of substantial injustice, the plaintiff, in his affidavits, asserted that he was "aggrieved" and "embarrassed" by his removal as director. However, these bare assertions, without more, do not rise to the level of substantial injustice contemplated by s. 582 of the CA 2016. In the Singapore Court of Appeal case of *Thio Keng Poon v. Thio Syn Pyn And Another Appeal* [2010] SGCA 16, the founder and former chairman/managing director of two family-owned companies was challenging his removal from those positions by the companies' Boards, alleging breaches of the companies' articles of association and oppression of his minority shareholder rights. Singapore Court of Appeal clarified that the injustice must be "real, rather than theoretical or fanciful", requiring some basis or indication that the aggrieved party had suffered or would suffer actual harm from the irregularity. Chao Hick Tin JA held:

> [75] The meaning of substantial injustice has been discussed by the courts in various jurisdictions on numerous occasions, and in this regard, the following principles can be distilled. First, it is axiomatic that there must be a direct link between the procedural irregularity in question and the

injustice suffered (see *Golden Harvest* ([55]; *supra*) at 955-956, *Mamouney v. Soliman* (1992) 9 ASCR 63 at 71 ("*Mamouney*")). Secondly, the injustice must be of a "substantial" nature. In essence, what this means is that the injustice must be real, rather than theoretical or fanciful.

[58] The plaintiff's claimed feelings of grievance and embarrassment, while understandable, do not without more constitute substantial injustice within the meaning of s. 582. Here, the plaintiff was notified of the proposed resolution, attended the EGM, and was given the opportunity to present his case before the voting members, 77.83% of whom voted in favour of his removal. In these circumstances, the plaintiff's bare assertion that he was "aggrieved" and "embarrassed" falls short of establishing any substantial injustice vitiating the EGM and its outcome.

[59] Furthermore, the outcome of the EGM belies any suggestion of substantial injustice. The results, as confirmed by the independent scrutineer, show that 77.83% of voting members present voted in favour of the plaintiff's removal as director. This overwhelming majority vote reflects the collective will of the shareholders exercising their statutory right under s. 206 of the CA 2016 to remove a director by ordinary resolution. To invalidate this outcome based on an irregularity in the notice of requisition would run counter to the principle of minimal court interference in the internal management of companies acting within their powers, as recognised in cases like *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113 and *Lim Seng Boon & Anor v. Chew Shin Yong, Mark & Ors* [2022] CLJU 1490; [2022] 1 LNS 1490.

[60] In *Owen Sim*, the Federal Court stated:

> Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies. Through a series of decisions of the Court of Chancery in the mid nineteenth century, they administered unto themselves a jurisdictional prohibition from entering upon domestic disputes between corporators. Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v. Harbottle* [1843] 67 ER 190; the second was *Mozley v. Alston* [1847] 41 ER 833.

[61] In *Lim Seng Boon*, Liza Chan J quotes from the Privy Council case of *Burland v. Earle* [1902] AC 83 which states "It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so." The court should be slow to override the manifest wishes of the majority shareholders in the absence of clear substantial injustice.

[62] In conclusion, while the notice of requisition contained an inaccurate statement of the second defendant's shareholding, this irregularity did not ultimately prejudice the plaintiff in any substantial way incapable of remedy. The second defendant, as a member, was entitled to requisition the EGM,

A and the Board was empowered to convene it, which it did. The plaintiff had notice of the proposed resolution, attended the EGM, voiced his objections, but was removed by an overwhelming majority of voting shareholders. To now invalidate the process based on a misstatement that did not deprive the plaintiff of the opportunity to present his case or affect the shareholder's B decision would be to strain at a gnat. In the circumstances, the originating summons is dismissed with costs.

Conclusion

[63] In the final analysis, the plaintiff has not established a sufficient basis C to invalidate the EGM of Advancecon held on 9 August 2022 and the resolution passed therein for his removal as director. The Board had the power to, and did in fact, convene the EGM pursuant to the constitution, independently of any irregularity in the notice of requisition. The second defendant, as a registered member of Advancecon, was entitled to issue the notice of requisition under s. 311(1) of the CA 2016, notwithstanding the D misstatement of his precise shareholding. The plaintiff was afforded the full panoply of rights accruing to him under the CA 2016 in respect of the EGM, including notice of the proposed resolution, attendance at the EGM, and the opportunity to make representations. The ultimate decision to remove the plaintiff as director was arrived at through a fair and proper vote of the E shareholders, with an overwhelming majority of 77.83% in favour of his removal. The plaintiff has not shown that any irregularities in the process leading up to the EGM have caused him any irremediable and substantial injustice. In these circumstances, there are no grounds for curial intervention. The resolution for the plaintiff's removal as director stands, and the F originating summons is accordingly dismissed with costs of RM15,000 awarded to each defendant.

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